

SOAH DOCKET NO. 582-12-3195
TCEQ DOCKET NO. 2011-1684-UCR

APPLICATION BY THE CITY OF	§	BEFORE THE STATE OFFICE
TYLER TO AMEND CERTIFICATE	§	
OF CONVENIENCE AND	§	
NECESSITY NO. 20319,	§	OF
APPLICATION NO. 37037-C IN	§	
SMITH COUNTY, TEXAS	§	ADMINISTRATIVE HEARINGS

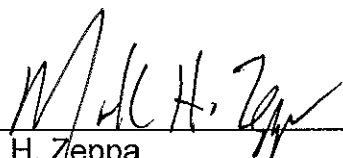
REPLIES TO TYLER'S EXCEPTIONS OF TALL TIMBERS UTILITY COMPANY,
INC., DBA LIBERTY UTILITIES

**TO THE HONORABLE TEXAS COMMISSION ON ENVIRONMENTAL
QUALITY:**

COMES NOW, Tall Timbers Utility Company, Inc., dba Liberty Utilities (TTUC)
and files its Replies to the Exceptions of the City of Tyler in the above-referenced
sewer utility dual certification docket.

Tyler's Exceptions are nothing more than a re-statement of the City's Closing
Arguments submitted to Administrative Law Judge Roy Scudday. These
arguments are adequately addressed in TTUC's Closing Arguments (copy
attached), which are incorporated herein by reference as TTUC's Replies.

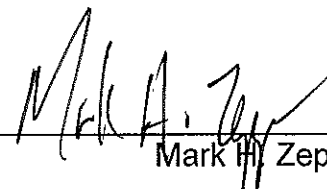
Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Mark H. Zeppa, certify that a true and correct copy of the foregoing brief was served on the Presiding ALJ and TCEQ Chief Clerk through efilng and served on all attorneys/parties of record by email on February 18, 2013. The service addresses used were the ones provided in the Service List attached to pretrial orders.


Mark H. Zeppa

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CLOSING ARGUMENTS OF TALL TIMBERS UTILITY COMPANY, INC.,
DBA LIBERTY UTILITIES

TO THE HONORABLE ROY SCUDDAY, ADMINISTRATIVE LAW JUDGE:

COMES NOW, Tall Timbers Utility Company, Inc., dba Liberty Utilities (TTUC) and files its Closing Arguments in the above-referenced sewer utility dual certification docket.

CONTESTED SERVICE AREAS

This application to amend certificate of convenience and necessity (CCN) was filed by the City of Tyler (Tyler or the City) seeking a sewer utility CCN to overlap TTUC's CCN inside the City's corporate limits. In this application, Tyler seeks to be dually certificated with TTUC inside TTUC's certificated service area. A separate dual CCN amendment application is pending that affects TTUC's service area outside of the City.

Since the filing of this application, several applications were received from affected landowners, including Tyler, requesting release of their properties from TTUC's CCN pursuant to Water Code §13.254(a-5). These applications were granted and TTUC was decertificated to the properties in question. TTUC takes no position on whether Tyler should be certificated to these properties.¹ There is a subdivision named The Crossing, which Tyler has long served (over 180 days) with TTUC's knowledge. TTUC has no objection to Tyler being certificated to that property. It is the remaining portions of TTUC's service area at the time of filing that are in contest in this docket. Those portions of the service area are shown on Tyler Exhibit 34, which is also the larger scale map used demonstratively during the testimony in this cause.² These same contested and uncontested service areas were shown by Staff Engineer Brian Dickey on ED Exhibit 2, as supported by Mr. Dickey's testimony on Tyler Exhibit 34.³

CERTIFICATION TO CONTESTED AREA NOT NECESSARY

To have any application to be granted or to amend a CCN, the applicant must prove by a preponderance of the admissible and credible evidence that such certification is "necessary for the service, accommodation, convenience or safety" of the public.⁴ The operative word in this statute is "necessary." If there

¹ TR at pg 19 line 1-8

² TR at pg 19, line 9-23

³ TR at pg 284, line 18- pg 285, line 6

⁴ Water Code §13.246(b)

is no need, the CCN cannot be granted or amended. In this instance, there is "no need" to certificate Tyler to the contested areas.⁵

Tyler's claims of need for certification to the contested areas are based on one thing. It is Tyler's avowed policy that it be the only retail sewer utility serving inside the City.⁶ While this may be an admirable policy for a municipality to have, it is contrary to the Texas law controlling this case. Local Government Code §43.056(b)(5) relieves Tyler of the obligation to provide water or sewer service within its corporate limits when the annexed area is "within the service area of another water or wastewater utility." Water Code §13.247(a) guarantees TTUC the right to continue to serve its existing service area when that territory is annexed by a municipality. There is no preference given to municipalities in the granting of CCNs,⁷ so Tyler cannot claim any superior right to serve in TTUC's service area.

In this case, TTUC was certificated and serving the area first. Tyler later annexed the area.⁸ TTUC's right to serve its existing service area after annexation may only be revoked if the area is decertificated pursuant to Water Code §13.254. Tyler tried this once but abandoned its petition. This remedy has

⁵ TTUC Exhibit 1, pg 15, line 6 – pg 17, line 4; TR. at pg 285, line 7 - 10

⁶ Tyler Exh. 1, pg 5, line 13 - 15

⁷ Water Code §§13.241-13.242, 13.245 and 13.246

⁸ TTUC Exhibit 1, pg 12, line 1 - 5

not been pled in this case. No decertification of any of TTUC's existing service area has been pled by any party.

This dual certification application must be examined under the specific certification criteria of Water Code §§ 13.241(c) and 13.246(b) and (c). Some of these criteria are uncontested. For example, no one contests that Tyler is able to design a sewer plant in compliance with the TCEQ's design criteria.⁹ Similarly, no one doubts the adequacy of Tyler's financial resources.¹⁰ Tyler's sewer service rates are currently lower than TTUC's, but no one knows what a potential sewer customer's total costs to obtain long-term sewer service would be from either utility.¹¹

It is also uncontroverted that TTUC is already serving customers in the areas in dispute in this case.¹² Tyler complains that TTUC will not have capacity to serve in the future, but this is mere speculation. It ignores the actions TTUC has undertaken to expand its wastewater treatment plant (WWTP) and discharge permit.¹³ Taking away customer base does not remedy existing treatment capacity shortfalls. Only plant expansions will do that. TTUC does not need or appreciate Tyler's paternalistic attitude that taking TTUC's service area and potential customer base is beneficial to the investor-owned utility (IOU). To the

⁹ Water Code §13.241(c)

¹⁰ Water Code §13.246(c)(6)

¹¹ Water Code §13.246(c)(8)

¹² Tyler Exh. 1, pg 101, line 2 – pg 102, line 23

¹³ TTUC Exh. 1, pg 9, lines 6 – 7 and pg 17, lines 8 - 14

contrary, the loss of potential customers in an expanding customer base makes it more difficult for TTUC to provide service at reasonable rates while expanding its WWTP under the utility basis of ratemaking an IOU must follow.¹⁴

Tyler claims that it must be certificated to TTUC's service area because TTUC has had violations at its WWTP. TTUC admits it experienced problems at the WWTP, which is why the utility is now engaged in enforcement negotiations with the TCEQ Executive Director (ED or Staff). Actions are being taken by TTUC to correct those problems.¹⁵ This is how enforcement is supposed to work under the Water Code.¹⁶ Not too surprisingly, negotiated enforcement settlement is what Tyler engaged in when it had unauthorized discharges from its sewer collection system.¹⁷ Neither utility has been subjected to modification or loss of its CCN by the TCEQ because both are collecting and processing sewage from customers which is how the agency views "providing service."¹⁸

Tyler complains that TTUC has ignored Tyler's acts as a "regulatory authority" under Water Code §13.42. This is not true. When Tyler retroactively ordered TTUC to stop charging developers capacity charges that were lawful under TCEQ rules and in TTUC's City-approved tariff, TTUC stopped charging those fees. However, when Tyler has asserted "regulatory authority" over TTUC over

¹⁴ TTUC Exh. 1, pg 19, line 5-21

¹⁵ TTUC Exh. 1, pg 8, line 12 – pg 9, line 20

¹⁶ Water Code §13.253 and §13.4151

¹⁷ TTUC Exh. 1, pg 8, liner 17 – pg 9, line 2

¹⁸ TR at pg 300, line 15 – pg 306, line 8

and above that granted by Water Code §13.42, TTUC has ignored Tyler and invited the City to initiate some type of lawful enforcement action so TTUC may challenge Tyler's action in a proper judicial forum. Tyler has declined to do this; it only complains what a bad utility TTUC is. Not too surprisingly, disputing a municipal ordinance is not grounds for decertification by the TCEQ.¹⁹ It should not be grounds for abridging an IOU's CCN. Under Water Code §13.246, it is not.

§13.246 CERTIFICATION CRITERIA

Service of the Public. Granting of Tyler's application to be dually certificated is not necessary for the service of the public.²⁰ TTUC is willing and capable of providing sewer utility service in its CCN, and the public is best served by a single utility. Redundant infrastructure resulting from dually certificated utilities produces higher rates for the customers, which is why it is uncommon to find utilities with overlapping service territories. There is no reason to believe that customers will not be serviced without the City's dual certification being granted. Liberty Utilities currently provides service to approximately 2,000 customers at TTUC, and about 73,000 customers throughout the four states in which it provides water & wastewater services. TTUC has the technical expertise and willingness to provide services, and the financial capability to fund such services.

¹⁹ Water Code §13.254

²⁰ TTUC Exhibit 1, pg 15, line 8-19

Accommodation of the Public. Granting of Tyler's application to be dually certificated is not necessary for the accommodation of the public.²¹ TTUC is fully capable of accommodating the public and operating within its tariffs as issued by TCEQ. TTUC stands at the ready to accommodate any developers who wish to develop property in its CCN. The utility will meet with them, take applications for service, and review and approve plans for their developments, all in accordance with its TCEQ-issued tariffs.

Convenience of the Public. Granting of Tyler's application to be dually certificated is not necessary for the convenience of the public.²² The Liberty Utilities model is to create a local utility with the financial backing of a larger parent, offering the customer the best of both worlds. TTUC has a conveniently located office in its service territory that is open to customers. TTUC encourages customers to come in and pay their bills or ask any questions they may have. This local office ensures that it is easy for new residential customers to sign-up for service and for potential developers to reach out to discuss their plans and future needs.

²¹ TTUC Exh. 1, pg 16, line 1-6

²² TTUC Exh. 1, pg 16, line 8 - 17

Safety of the Public. Granting of Tyler's application to be dually certificated is not necessary for the safety of the public.²³ TTUC is currently and will continue to provide safe and reliable sewer collection, treatment and disposal services to its customers. Furthermore, TTUC's parent, Liberty Utilities, has a track record throughout its service territories of providing safe, clean, reliable service to its customers and the communities it serves. Liberty Utilities has an extensive environmental, health and safety program, which monitors and addresses all aspects of public safety.

Adequacy of Service Currently Provided. Current sewer utility service to and planned for the disputed areas is adequate.²⁴ TTUC service reflects Liberty Utilities' balanced approach to utility operation for current demands and for future demands. TTUC maintains the capability to serve its existing customers, and as demand has risen, the company plans and acts accordingly. As a result of this planning, TTUC is currently undergoing an expansion that will allow it to prudently grow its treatment capacity. This increased capacity will allow TTUC to meet the current increase in demand as well as provide prudent headroom for growth. TTUC Has never refused service to anyone due to inadequacy of our system or its capabilities. The increased capacity is scheduled to come on-line in approximately 12 months.

²³ TTUC Exh. 1, pg 16, line 21 - pg 17, line 4

²⁴ TTUC Exh. 1, pg 17, lines 8 - 19

Need For Additional Service. There is no need for additional service from another service provider - Tyler.²⁵ TTUC has the capacity to serve current customers, is doing so and is developing the capacity to serve future customers.

Effect of Granting Amendment on the Recipient on Landowners in the Area and on Utilities of Like Kind. The primary effect of granting the CCN amendment will be economic and will adversely affect Tyler, TTUC and customers in the disputed areas.²⁶ If the City were to install collection system infrastructure in locations where TTUC already has existing infrastructure, this would be not only a redundant cost, but one which would not benefit customers because customers cannot readily change service providers instantaneously if they have a service problem. In the event that some existing TTUC customers selected to use City's service, the cost of pipe and treatment capacity that was being borne by that departed customer would now have to be borne by the customers remaining on the TTUC system, thus increasing the cost of service and rates for the remaining TTUC customers. The granting of a dual CCN would lead to twice the amount of infrastructure being installed than is necessary, and ultimately a greater cost to consumers.

The City claims that TTUC slows growth because of its policy of charging developers for their share of capacity. Ultimately, there is cost for pipes and cost

²⁵ *Id.*

²⁶ TTUC Exh. 1, pg 19, line 5 – pg 20, line 2

of capacity that must be incurred, whether by TTUC or by the City. If the City decides to not charge developers for growth and the additional demand they put on the system, that is its choice; but that cost, which the developers are not charged for, still has to be paid by someone, and that is most likely the existing customer base. So when the City says that competition between the City and TTUC would help developers, that may be the case, but it will not help the existing customer. The costs of development have to be paid by someone, and if it's not the developer, it's going to be the taxpayer or ratepayer of the utility. TCEQ rules give an IOU the option of bearing that investment cost or passing some or all of it on to developers.²⁷ TTUC assigns that cost to the developer.

Ability of the Applicant to Provide Adequate Service. Tyler can and does operate a good and reliable utility system.²⁸ However, Tyler has no facilities in the disputed areas. It would have to build them, which will take some time after any CCN amendment is issued.²⁹

Feasibility of Service from Adjacent Utility. TTUC already serves the area and plans to continue to do so.³⁰

²⁷ 30 TAC §291.86(c)(2)

²⁸ TTUC Exh. 1, pg 20, line 7 - 8

²⁹ TTUC Exh. 1, pg 20, line 8 - 19

³⁰ TTUC Exh. 1, pg 17, line 8 - 14

Ability of Applicant to Pay for Facilities. This is not contested. Tyler has or can obtain from developers, the money needed to build sewer plant wherever it needs it.³¹

Environmental Integrity. Granting the CCN amendment will not benefit the environment.³² Both utilities strive to operate their systems in compliance with all environmental laws, but both occasionally have problems. Each has worked with the TCEQ to remedy those problems. TTUC is expanding its WWTP. Tyler did not say what it has done to stop raw sewage excursions, but TTUC believes the City will do its utmost to prevent them in the future. Two sewer systems in the same areas just increase the likelihood that problems will arise because there will be excess infrastructure.

Probable Improvement of Service or Lowering of Costs. For the many reasons discussed above, granting the CCN amendment will not improve service.³³ Current customers are adequately served. New infrastructure will have to be built by either utility to extend collection lines where none currently exist. Duplication of facilities will be a cost burden on customers.

³¹ TTUC Exh. 1, pg 21, line 16-18

³² TTUC Exh. 1, pg 22, line 5 - 21

³³ TTUC Exh. 1, pg 23, line 4 - 10

Effect on land. The effect on land will be the same regardless of which utility serves the disputed areas.³⁴ Undeveloped land will be able to be developed when developers are ready to make the necessary investments upon compliance with all TCEQ rules and tariff provisions of either utility. Soils will be disturbed and line construction will ensue regardless of who holds a CCN.

PROPOSED FINDINGS OF FACT & CONCLUSIONS OF LAW

Since the areas in dispute between Tyler and TTUC are limited and the scope of the CCN amendment application still extends to other territory, these proposed Findings of Fact (FOF) And Conclusions of Law (COL) are intended to be limited to those areas and not apply to other areas covered by the Staff's recommendations.

1. FOF1. TTUC is a retail public sewer utility which is already certificated to the disputed areas.
2. FOF 2. TTUC provides continuous and adequate sewer utility service to the disputed areas under the TCEQ's rules and its City-approved tariff.
3. FOF 3. TTUC is undertaking reasonable steps to prudently expand its permitted WWTP capacity.

³⁴ TTUC Exh. 1, pg 23, line 13-14

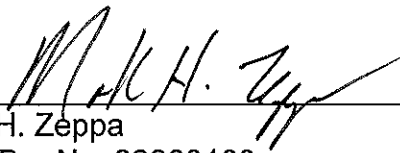
4. FOF 4. There is no evidence to establish that TTUC will not provide continuous and adequate service to the disputed areas in the future under the requirements of its TCEQ-issued CCN.
5. FOF 5. There is no need for additional service from a separate sewer utility service provider in the disputed areas.
6. FOF 6. Granting the requested CCN amendment will result in the unnecessary duplication of sewer utility infrastructure.
7. FOF 7. Granting the City's CCN amendment application will not enhance or benefit sewer service to other Tyler customers.
8. FOF 8. Landowners in the disputed area can be adequately served by TTUC, so certification of the area to Tyler is not necessary.
9. FOF 9. No improvement to the environment will occur if the City's CCN amendment is granted.
10. FOF 10. Granting the CCN amendment will not improve service to the disputed areas.
11. FOF 11. The disputed areas will develop as landowners are willing to make necessary investments, regardless of which utility is certificated to the disputed areas.
12. FOF 12. Granting the City's requested CCN amendment for the disputed areas is not necessary to the service, accommodation, convenience or safety of the public.

13. COL 1. The TCEQ has jurisdiction over this application under Texas Water Code Chapter 13, Subchapter G.
14. COL 2. In order to grant the City's requested CCN amendment, the Commission must find that granting the amendment for the disputed areas is necessary to the service, accommodation, convenience or safety of the public.
15. COL 3. There is no need for retail public sewer utility service from Tyler in the disputed areas.
16. COL 4. Tyler is not entitled to an amendment to its sewer utility CCN to include the disputed areas.

SUMMARY

FOR THE REASONS CITED ABOVE, TTUC submits that the City of Tyler's application to amend its sewer utility CCN in the disputed areas be denied. TTUC takes no position on whether Tyler's CCN should be otherwise amended as testified to by Staff Engineer Brian Dickey.


Respectfully submitted,

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LIBERTY UTILITIES

CERTIFICATE OF SERVICE

I, Mark H. Zeppa, certify that a true and correct copy of the foregoing brief was served on the Presiding ALJ and TCEQ Chief Clerk through efilng and served on all attorneys/parties of record by email on November 2, 2012. The service addresses used were the ones provided in the Service List attached to pretrial orders.


Mark H. Zeppa